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In the Supreme Court of the United States

OCTOBER TERM, 1982

AETNA CASUALTY AND SURETY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the allegedly improper conduct of trial counsel did not constitute reversible error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 681 F.2d 186. The opinion of the district court (Pet. App. A49-A93) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982, and a petition for rehearing was denied on August 19, 1982. On November 16, 1982, the Chief Justice granted an extension of time to January 14, 1983, within which to petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action arises out of the September 11, 1974, crash of Eastern Air Lines Flight 212 near Douglas Municipal Airport at Charlotte, North Carolina. The petitioners are Aetna Casualty and Surety Company and 18 other insurance companies who insured Eastern against liability and the owner/lessor of the DC-9 aircraft against loss. Petitioners brought this action in the United States District Court for the Western District of North Carolina, seeking contribution from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, and from three air traffic controllers (respondents Hare, Hogan, and Hunter) and the Chief of the Charlotte Tower (respondent Groseclose) under state common law. Petitioners alleged that the government's and the air traffic controllers' concurring negligence rendered them liable for $11 million of the $25 million in claims paid out on account of the crash (Pet. App. A50-A51).

This action was consolidated for all purposes with three actions brought against Eastern Air Lines by injured or deceased passengers of Eastern 212.[1] Petitioners' and Eastern's motions to sever the cases for separate trials were denied, and petitioners' claims against the air traffic controllers were tried to a jury. The FTCA claim against the United States was tried concurrently to the court. See 28 U.S.C. 2402.

At the conclusion of trial, the jury found that the individual respondents were not liable in contribution to petitioners.[2] The district court similarly found no negligence on the

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[1] In two of the three passenger cases Eastern brought third-party actions against the United States seeking contribution toward any compensatory damages awarded to the plaintiffs (Pet. App. A51).

[2] In the three passenger cases, the jury denied the plaintiffs punitive damages but awarded them over $5 million in compensatory damages.

part of the United States under the Federal Tort Claims Act (Pet. App. A51). The court found no duty on the part of the air traffic controllers to monitor Eastern 212 with respect to its altitude (*id.* at A77-A84). The court noted that once an airplane is cleared for final approach, as Eastern 212 was, "the pilot has the sole authority to determine whether he can land safely" (*id.* at A82). Moreover, the court found that the air traffic controllers did not actually know of Eastern 212's danger before the crash and therefore did not breach their duty to warn the plane of known dangerous situations (*id.* at A77, A81, A84-A85). The court found that "[a]n accident of this sort could occur only through pilot inattentiveness and carelessness of a truly extraordinary nature" (*id.* at A85). Thus, any possible negligence of the United States or the individual air traffic controllers, "if a cause at all, was a remote rather than a proximate or producing cause" (*ibid.*).

2. The court of appeals affirmed this aspect of the judgment of the district court (Pet. App. A1-A48). Petitioners argued in the court of appeals, as they do here, that improper conduct by opposing counsel denied them a fair trial. After carefully setting forth and analyzing petitioners' contentions (Pet. App. A12-A32), the court of appeals found that "the district court properly acted within its discretion" in declining either to set aside the jury's verdict or to grant a new trial on this ground. The court of appeals, in any event, concluded that the conduct of counsel was not likely to have affected the outcome of petitioners' claims against the United States and the individual respondents. The court noted that "the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was * * * a 'remote rather than a proximate cause' " (*id.* at A32).[3]

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[3]The court of appeals also found no abuse of discretion in the decision of the district court to deny the motions to sever the actions for trial

Judge Murnaghan, concurring in part and dissenting in part, would have reversed the three passenger actions for a new trial to fix the proper amounts of compensatory damages because of the conduct of opposing counsel (Pet. App. A37-A48). However, "as to the claims against the United States and the air traffic controllers, [he] perceive[d] no sufficient prejudice respecting those quite different causes of action to necessitate a new trial" (*id.* at A48). Judge Murnaghan noted that the claims against the United States had to be tried to the court and the trial judge "was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been" (*ibid.*). The air traffic controllers, moreover, were "fully relieved of liability by reason of the judgments entered on the claims against the United States, irrespective of how they came out" (*ibid.*, citing 28 U.S.C. 2676).[4]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and presents no issue warranting further review.

1. Petitioners contend that, because of the conduct of counsel for the United States, the court of appeals should have reversed and remanded petitioners' case for a new trial

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(Pet. App. A8) or in the district court's refusal to admit certain evidence pertaining to the training and supervision of the air traffic controllers (*id.* at A33). Petitioners have not challenged these rulings in this Court.

[4]Petitioners' petition for rehearing was denied on August 19, 1982. The court of appeals granted a petition for rehearing en banc in the three passenger cases on December 23, 1982. Petitioners have requested this Court to defer consideration of their petition for a writ of certiorari pending final disposition of the passenger cases by the court of appeals. Because the outcome of the passenger cases in the court of appeals cannot affect the decision in this case, and because petitioners' fact-bound claims plainly do not warrant review by this Court, we see no reason to defer consideration of this petition for the indefinite period suggested by petitioners' motion.

(Pet. 10-11). The court of appeals correctly concluded that the district court acted within the proper bounds of its discretion in declining to set aside the jury's verdict on this ground. The court of appeals recognized that (Pet. App. A12):

> Of the many details of trial management necessarily committed to broad trial court discretion, perhaps none is more due appellate deference than conduct of non-judicial participants in the process that is asserted unfairly to have prejudiced the jury. *See Arkwright Mutual Insurance Co.* v. *Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970); *see generally* F. James and G. Hazard, *Civil Procedure* § 7.18 (2d ed., 1977). This is a matter preeminently for on-the-scene sensing by trial judges. At that vantage point demeanor—here that of the jury—can be observed; the impact of efforts to control and dissipate prejudicial effects can be assessed in light of the interpersonal relationship that inevitably develops between trial judge and jury; and the actual effect of the conduct upon jurors — an effect frequently at odds with or actually counter-productive to that improperly intended by the offender — can be gauged first-hand. For the very reason that the problem is essentially one of assessing the immediate emotional and psychological effect of specific actions and words on particular people, the appellate vantage point in retrospective review on a cold written record is especially subject to misperceptions of what actually transpired and, more subtly, to miscalculations of likely effects.

The court of appeals noted that the "critical inquiry" was whether the trial judge's response to the purported misconduct of counsel "constituted a prejudicial abuse of discretion" (Pet. App. A17). In answering this question, the court of appeals thoroughly discussed the challenged conduct of

counsel and analyzed the propriety of the trial court's response to it (*id.* at A14-A24). The court of appeals noted that the nature of the issues in petitioners' and the passenger cases invited a broad range of evidence of an inescapably volatile nature (*id.* at A19). The cases involved allegations of gross, wanton, and consciously indifferent conduct, and "the dominance of such issues" justified "cautious policing of emotional sallies during trial" (*id.* at A20). Moreover, the court stated that, because the great weight of "wholly proper evidence" disfavored petitioners, an appellate court should exercise "great caution" in setting aside the verdict against them on the ground of improper influence (*ibid.*). The court of appeals concluded that the challenged arguments of counsel were adequately dissipated by the general cautionary instructions of the trial judge (*id.* at A20, A22).

In any event, the court of appeals noted that any misconduct by counsel was not a "reasonably probable" explanation for the jury's verdict against petitioners on their contribution claim (Pet. App. A31-A32). "Laying aside all the other factors, the critical circumstance here is that, to us, the issue of concurring negligence — of proximate causation —on which this claim turned, simply cannot be assessed as one so 'close' that we would be justified in attributing the verdict upon it to any such improper influence. While the issue going in was obviously an honestly disputable one, the evidence adduced readily explains the jury's determination that if there was any negligence on the part of the air traffic controllers it was, in the district court's stated analysis, a 'remote rather than a proximate cause.' We are not prepared to reject that ready and proper explanation in favor of the improper one for which [petitioners] contend[ ]. Obviously we find no abuse of discretion in the district court's refusal to set aside this verdict on this ground." *Id.* at A32.

2. In spite of the considerations mentioned above, petitioners contend that, if the trial behavior of counsel had been controlled, there would have been a jury verdict against the individual respondents because "[t]he negligence of the individual respondents was blatant" (Pet. 13). Two courts, however, have looked at the facts of this case and have concluded that there was no negligence on the part of the United States or any of its employees. This Court has often held that it will not "review concurrent findings of fact by two courts below" except upon "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There has been no such showing here.[5]

Eastern Flight 212 crashed three miles short of the Charlotte, North Carolina runway on September 11, 1974, killing 71 people and severely injuring 11 survivors. The cockpit tapes show that the captain and co-pilot were totally unaware that the plane was flying too low until seconds before the crash (Pet. App. A51-A52).[6] The crew, moreover, disregarded at least 10 warnings of the plane's dangerously low altitude (*id.* at A53).[7]

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[5]Petitioners make much of the fact that the district court initially determined that the jury would render an advisory verdict against the United States, but later did not submit the case against the United States to the jury (Pet. 3, 13). Petitioners do not explain how they may have been prejudiced by these events.

[6]A transcript of the conversations in the cockpit and on the ground from 11:25:08 to 11:33:57, the time of impact, can be found at Pet. App. A56-A72. The conversation in the cockpit concerned various topics totally unrelated to the flight.

[7]The district court found that the crew of Eastern 212 disregarded (Pet. App. A53):

a) two warning indicators showing that the plane was descending too rapidly;

b) two indicators showing that the plane's nose was pointed too low;

Petitioners contend that, notwithstanding the negligence of the crew, the United States and the individual respondents negligently failed to warn Eastern 212 of its low altitude (Pet. 14-17). At the time of the crash, the air traffic control system in Charlotte had an automatic radar terminal system that was coupled with a computer to provide altitude data on incoming air traffic ("ARTS III"). However, the district court found that, contrary to petitioners' assertions, the ARTS III equipment had neither been planned nor installed with the expectation that it would be used to monitor altitude below 2,000 feet (Pet. App. A76).[8] The equipment was designed and utilized solely to separate incoming and departing planes from one another (*ibid.*). The court similarly found nothing in the FAA's manuals, directives, or regulations that required the controllers to use the ARTS III equipment to monitor the altitude of approaching planes (*id.* at A78-A80).[9] Finally, because the accident could only have occurred "through pilot inattentiveness and carelessness of a truly extraordinary nature" (*id.* at 85), the court was "not persuaded, as apparently neither [was] the jury, that a warning from the tower, if it had been received, would have prevented the accident. The crew [was] not simply inadvertent but rather [was] grossly negligent" (*id.* at A86).

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c) four altimeters on the instrument panel showing the dangerously low altitude of the plane;

d) the "terrain warning system," consisting of a warning light and a whistle (the signal and whistle were simply turned off and ignored).

[8]The ARTS III equipment, though normally reliable to the nearest 100 feet, may be 299 feet too high or 299 feet too low. In addition it may be four to five seconds out of date, a crucial defect if the equipment is to be used to monitor rapid ascents or descents (Pet. App. A76).

[9]The district court found that no one in the control tower was actually aware of the altitude of Eastern 212 (Pet. App. A81).

The record, therefore, provides ample support for the findings of the district court and jury regarding the liability of the United States and the individual respondents. These findings were properly upheld by the court of appeals, and present only factual issues that do not warrant review by this Court.

3. Finally, the finding of the district court on petitioners' FTCA claim obviates the necessity for further review of petitioners' allegations of misconduct by government counsel. Petitioners' claim against the United States was tried to the court. The judge obviously was capable of rejecting any prejudicial comments of counsel. As Judge Murnaghan noted in concurring in the judgment upholding the verdicts in favor of the United States, "Judge McMillan was not exposed to the likelihood of prejudice in the way that the jurors may be expected to have been" (Pet. App. A48). The district court found for the United States, and that decision provides a complete bar to the claims against the individual air traffic controllers. 28 U.S.C. 2676.[10] There is, therefore, no substantial likelihood that the alleged misconduct of counsel actually prejudiced petitioners, and there is accordingly no need for further review of petitioners' contentions.[11]

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[10]28 U.S.C. 2676 provides:

> The judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

[11]Contrary to the assertions of petitioners (Pet. 17), the allegedly prejudicial comments of counsel did not prevent them from obtaining a directed verdict against the United States. Even if the jury had found against the individual respondents, the judgment of the district court for the United States under the FTCA would have constituted a bar to the claims against the FAA employees. *Satterwhite* v. *Bocelato*, 130 F. Supp. 825, 829, (E.D.N.C. 1955); *Lauterbach* v. *United States*, 95 F. Supp. 479, 482 (W.D. Wash. 1951). See *United States* v. *Gilman*, 347 U.S. 507, 509 (1954).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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